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No. 07-168

FILED
SEP 7 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

RANDY W. BLADES, et al.,

Petitioners,

v.

LEONARD HAMM, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Should the Court grant certiorari to review Petitioners' claim that the Americans with Disabilities Act requires a police department to provide permanent light duty positions for officers who are medically unfit to perform the essential functions of the job?

2. Should the Court grant certiorari to review whether Rule 56 of the Federal Rules of Civil Procedure violates the Constitution of the United States of America?

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents, the Mayor and City Council of Baltimore, the Baltimore Police Department, former Police Commissioner Leonard Hamm, and former Legal Counsel Sean Malone, request that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Fourth Circuit in this case.

INTRODUCTION/COUNTER STATEMENT

The essential functions of Baltimore City police officers are outlined in the Public Local Laws of Maryland. PUBLIC LOCAL LAWS OF MD., ART. 4, § 16-2(a). Section 16-2(a) specifically charges members of the Department with preserving the public peace, detecting and preventing the commission of crime, apprehending and arresting criminals and persons who violate or are lawfully accused of violating the law, preserving the order at public places, and maintaining the orderly flow of traffic on public streets. An officer may be assigned other tasks, but pursuing and arresting lawbreakers is the fundamental responsibility of a police officer.

In January 2004, the Baltimore Police Department ("BPD" or "the Department") had 169 police officers, representing 5% of its sworn members, working in a light duty capacity. Having such a large number of officers unavailable for law enforcement deployment compromises the Department's core

mission. Consequently, the Department set about to clarify that there are no permanent light duty positions for police officers. After two years of negotiations with the Fraternal Order of Police ("FOP"), the labor organization for City police officers, the Department adopted a new general order effective March 25, 2005.

The policy has a comprehensive process to address the needs of those officers who, after examination by the City's Public Safety Infirmary ("PSI"), are deemed permanently unfit for full duty and unable to perform the essential functions of a police officer. Officers have twelve months to recover and assume the full duties of a police officer or complete the appropriate procedure to separate themselves from the Department through retirement. Retiring officers who wish to remain employed by the Department may apply for contractual positions for retirees or request employment as fulltime civilian employees.

Petitioners, all of whom had worked light duty for significant periods of time, filed an action on March 31, 2005 seeking a temporary restraining order and preliminary injunction claiming that the BPD's policy violated the Rehabilitation Act, 29 U.S.C. § 794(a) and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12188(a).

The United States District Court for the District of Maryland denied the requested injunctive relief because the Petitioners demonstrated no irreparable

injury. On April 20, 2005, the Department filed a motion for summary judgment and, subsequently, Petitioners filed a cross-motion for summary judgment. After a hearing on the parties' cross-motions on February 10, 2005, the District Court ruled in favor of Respondents by a decision and order dated February 22, 2006. The District Court found that Petitioners failed to make a prima facie case under the ADA because, by their own admission, they are unable to perform the essential functions of the job of police officer.

Petitioners filed an appeal to the United States Circuit Court of Appeals for the Fourth Circuit. The Court issued a per curiam opinion on May 10, 2007 affirming the decision of the District Court.

Petitioners fail to present any compelling reason why their request for a writ of certiorari should be granted. *See,1* Supreme Court Rule 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.") There is no split among the circuits, as Petitioners' claim, with respect to the application of the ADA's regulations on offering existing vacancies as a reasonable accommodation. Furthermore, Petitioners' raise for the first time before this Court the baseless assertion that Fede -l Rule of Civil Procedure 56 is unconstitutional.

Because the issues presented are not worthy of review and because the controversy was correctly decided below, the writ should be denied.

ARGUMENTS FOR DENYING THE WRIT

I. THERE IS NO SPLIT AMONG THE CIRCUITS ON THE ISSUE OF REASSIGNMENT TO VACANT POSITIONS UNDER THE ADA.

The ADA provides that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual. . . . " 42 U.S.C. § 12112(a). To make a colorable ADA claim, a complainant must be able to show that: he has a disability; is a qualified individual who is able to perform the essential function of the job, with or without reasonable accommodation; and has suffered an adverse employment decision. 42 U.S.C. § 12112. A reasonable accommodation may include: "job restructuring, part-time or modified work schedule, reassignment to a vacant position, [and] acquisition or modification of equipment or devices . . . " 42 U.S.C. § 12111(9)(B); *see also,* 29 C.F.R. § 1630.2(o)(2)(ii). In the instant case, the BPD complied with this requirement because the retiring officers who wished to remain employed by the BPD were given the opportunity to apply for a contractual position for retirees or request employment as fulltime civilian employees.

In an attempt to manufacture a split among the circuits, Petitioners misrepresent the state of the law regarding reasonable accommodation. Petitioners assert that the Fourth Circuit is not following the law as noted above that defines reasonable accommodation. However, Petitioner cites Fourth Circuit cases decided *before* the passage of 29 C.F.R. § 1614.23, which provides that a reasonable accommodation may include reassignment to a vacant position. *See, Gile v. United Airlines, Inc.*, 95 F.3d 492, 498 (7th Cir. 1996) ("Those courts which have found that reassignment to a different position cannot be a reasonable accommodation under the ADA mistakenly rely upon preamendment Rehabilitation Act cases stating that proposition under the Rehabilitation Act. *See, Myers v. Hose*, 50 F.3d 278, 284 (4th Cir. 1995) (citations omitted)); *accord Scott v. Montgomery County Government*, 164 F. Supp. 2d 502, 507-08 (D. Md. 2001).

In fact, Petitioners cite no Fourth Circuit case that rejects the federal law on transfer to vacant positions. *See, e.g., Lassiter v. Reno*, 1996 WL 281933, *7 n.5 (4th Cir. 1996) ("Effective October 1, 1992, federal agencies are required to reassign disabled employees to suitable, funded, vacant positions located in the same commuting area provided the reassignment does not impose undue hardship on the operation of the program. *See,* 29 C.F.R. § 1614.203(g) (1995)".)

Throughout this litigation, Petitioners have sought to convince a court that the ADA requires the Department to create and maintain permanent light

duty jobs, at full pay, for individuals who, by their own admissions, cannot perform the duties of a police officer. *See generally,* Br. 16-18. However, as the court below found, the law is clear that an employer need not maintain permanent light duty positions as a "reasonable accommodation" under the ADA. 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii).

In public safety agencies, the number of employees seeking light duty assignments can grow quickly, because of the high risk of physical and psychological injury. The more officers serving in a limited light duty capacity, the fewer available officers there are for direct law enforcement operations. Under Petitioners' ADA analysis, a police department would be rendered powerless to act, even if all members of a police force were unfit for full duty.

Petitioners' petition for writ of certiorari should be denied because there is no split among the circuits with respect to the application of the ADA's regulations on reasonable accommodation.

II. FEDERAL RULE OF CIVIL PROCEDURE 56 DOES NOT VIOLATE THE UNITED STATES CONSTITUTION.

A. Petitioners raise a challenge to the use of Rule 56 for the first time in their petition for certiorari.

For the first time in their petition, Petitioners argue that the application of Rule 56 of the Federal Rules of Civil Procedure is unconstitutional. Br. 19.

This argument is particularly curious because the case was before the United States District Court for the District of Maryland on *cross-motions* for summary judgment.

Petitioners cite no case law to support their novel legal theory, but cite a law review article by a law professor at the University of Cincinnati College of Law to support their claim that Rule 56 is unconstitutional. Br. 26. It is well settled that judgment on the pleadings does not violate the constitution. *Weisgram v. Marley Co.*, 528 U.S. 440, 453 n.10 (2000) (court may order entry of judgment as a matter of law on sufficiency-of-the-evidence grounds without violating the Seventh Amendment's jury guarantee); *Neely v. Martin K. Eby Const. Co.*, 217 U.S. 475, 487 (1967) (rule providing for judgment n. o. v. does not violate Seventh Amendment's guarantee of jury trial); *Souffront v. La Compagnie Des Sucreries De Porto Rico*, 217 U.S. 475, 487 (1910) (court does not usurp province of the jury in rendering judgment upon the pleadings); *Fidelity & Deposit Co. of Maryland v. U.S.*, 187 U.S. 315, 321 (1902) (right to trial by jury not denied by rule authorizing judgment for want of a sufficient affidavit of defense). In fact, this court has reviewed and affirmed many ADA cases decided on summary judgment. *See, e.g., US Airways, Inc. v. Barnett*, 535 U.S. 391, 406 (2002); *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 805-06 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 525 (1999).

Petitioners' challenge to the constitutionality was not raised or considered by the lower courts. Rather, at the Fourth Circuit, Petitioners argued that the trial court erred in not granting their cross-motion for summary judgment because the Department failed to conduct a case-by-case determination as to each of the Petitioners' need for accommodation.

Because the issue was not raised below, it is not properly before this Court. *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 233 (1954) (the Supreme Court will not undertake to review what the court below did not decide.) *U.S. v. New York Telephone Co.*, 326 U.S. 638, 651, n.18 (1946) (argument regarding application of the group method of depreciation would not be considered as it was not made until the case reached the Supreme Court.)

B. The lower courts applied the proper legal standard in granting Respondents' motion for summary judgment.

To make a colorable ADA claim, a complainant must be able to make a prima facie case, which demonstrates that he is disabled and qualified to perform the essential functions of the job, with or without reasonable accommodation. 42 U.S.C. § 12101 et seq., 29 C.F.R. § 1630.1 et seq. The lower courts found that Petitioners failed to set forth a prima facie case under the ADA because there was no dispute that they were unable to perform the essential functions of the job of police officer.

Petitioners argue at some length that the lower court failed to apply the proper legal standard and, therefore, summary judgment should not have been granted. Br. 21-23. The authority cited, however, has no application to the instant case because the petition cites cases in which the employee had *successfully* met its burden of making a prima facie case and the burden of proof had shifted to the employer. *Id.*

In the instant case, the District Court found that Petitioners failed to make a prima facie case of discrimination under the ADA, the facts were not in dispute and that Respondents were entitled to judgment as a matter of law. Petitioners' petition utterly fails to raise any issue that requires a review by this Court.

CONCLUSION

Because the petition fails to satisfy any criteria for justifying review by this Court and because the case was correctly decided below, Respondents request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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